NO. 48730-6-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint of:

MICHAEL D. OLMSTED,

Petitioner.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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4. Was defense counsel ineffective in failing to object to the State's extensive reliance on jail calls allegedly made by Mr. Olmsted with his father where the State did not move to admit the recordings as evidence and therefore it was not properly admitted?

5. Was Mr. Olmsted denied his right to a fair trial when the prosecutor argued facts not in evidence regarding jail calls allegedly made by Mr. Olmsted to his father?

B. SUPPLEMENTAL STATEMENT OF FACTS

The pertinent facts are set forth in the first supplemental brief of petitioner, with the addition of the following:

Mr. Olmsted has raised a search and seizure issue in his Personal Restraint Petition (PRP) at 37, regarding unauthorized entry into his residence by law enforcement following the incident. RP 3A at 260- 61. Ms. Yeager was not on the lease to Mr. Olmsted's residence, did not have a key to his residence, and she had been out of the residence for several weeks prior to the incident. In a statement to the defense investigator on April 26, 2013, Amy Yeager stated that he had moved out of the residence and had been gone

for several weeks. PRP, Appendix D, at 35, lines 3 through 11. She did not have a key to Mr. Olmsted's residence and Officer Long, without benefit of a warrant, forced open Mr. Olmsted's door with a credit card and then let Ms. Yeager into the residence. RP 3A at 260-61.

During cross examination of Mr. Olmsted, the prosecutor asked him if he recalled talking with his father on February 1, 2013, during a jail telephone call. RP 3B at 424. Mr. Olmsted stated that he had several jail calls with his father. RP 3B at 424. The state asked the following:

> Q: Do you remember saying that they can't convict you for striking your bitch?
> A: Yeah, I think I recall that, yes.
> Q: Do you recall saying that it was just a reaction when you hit her?
> A: I don't recall saying that exactly.
> Q: Okay.
> A; It could have been—yeah, it could have possibly. I–I don't know. I don't know exactly what the conversation was about.
> Q; Do you remember saying, "She –she kicked me and I lost my temper?"
> A: No.
> Q: Okay. Do you remember talking to you dad on February 2, 2013?
> A: I—I suppose I could have. I don't recall every conversation I had with my pop and what day it was on.

RP 3B at 424-25.

The State's cross examination continued without defense objection.

The prosecutor asked:

> Q: Ok. Do you remember saying on multiple occasions that you just blacked out, you're not sure?
> A: No.
> Q: You didn't?
> A: I don't — I don't — I don't recall ever saying that I on multiple occasions that I blacked out.
> Q: Okay. Do you recall on February 2nd, 2013, a phone call at 16:47 saying—your dad saying, "I told you, don't hit her," and your response, " But I couldn't fucking stop"?
> A: I recall saying something of that nature, yes, because I was talking in regards of pain—?
> Q: Thank you.
> A: —and it was a reaction to the pain that I felt from it, yeah. So I didn't have—I didn't have—it wasn't a thought out process, no.

RP 3B at 425.

During rebuttal argument, the State argued:

> So in these recorded jail phone calls, these monitored jail phone calls, the Defendant refutes himself on self-defense. He says it was an instantaneous reaction. "I lost my temper. I couldn't fucking stop myself. They can't convict me for slapping my bitch." That's not being in fear, that's not trying to prevent an assault, that's retaliation. Retaliation is not self-defense.

RP 3B at 555.

D. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S USE OF A RECORDED JAIL CONVERSATION WHERE THE RECORDING WAS NOT ADMITTED AS EVIDENCE.

Defense counsel provided ineffective assistance of counsel by failing to object to the prosecutor's extensive reliance on recorded jail conversations where the recordings were not admitted as evidence. RP 3B at 425, 555.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and that the performance prejudiced the defendant's case. ***Strickland v. Washington***, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness. ***State v. Stenson***, 132 Wn.2d, 668, 705-06, 940 P.2d 1239 (1997). To satisfy the prejudice prong, a defendant must show a "reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

There is a strong presumption that counsel provided effective assistance. ***State v. Tilton***, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). To rebut this presumption, a defendant bears the burden of establishing the absence of any "'conceivable legitimate tactic explaining counsel's performance.' "***State***

v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).

Here, the State questioned Mr. Olmsted during cross examination regarding jail calls allegedly made to his father. RP 3B at 425. The prosecution examined him extensively regarding the recorded calls, including a statement allegedly made by his father. However, the State did not move to admit the recordings.

Mr. Olmsted was questioned about statements he allegedly made to his father that he allegedly could not stop himself, that he blacked out and that he "lost his temper." RP 3B at 424-26. The prosecution used his statements to argue that he did not act in self-defense. RP 3B at 555. His defense counsel failed to object as the State continued to refer to the jail calls and did not object to the father's hearsay statement. RP 3B at 424-26. Defense counsel clearly had a basis for objection and his objection would have been sustained because the recording was not admitted as evidence.

Furthermore, because there was no objection, the record is silent as to whether the recording would have been admissible. The record establishes that defense counsel's performance was deficient in failing to object to the referral to the recording because it was not admitted as evidence, and Mr.

Olmsted was prejudiced by defense counsel's deficient performance because the State used the statements to undermine his self-defense argument. RP 3B at 555.

Here, there was no conceivable reason not to object to the prosecutor's arguing facts not in evidence. Mr. Olmsted's defense was based primarily on self-defense. Without the argument and the inflammatory statements that he "couldn't fucking stop" himself and that they could not "convict me for slapping my bitch", the evidence was compelling that Mr. Olmsted acted in self-defense; he was severely injured by Ms. Yeager in the incident and introduced evidence that he was severely kicked in the scrotum. Defense Exhibits 33, 34 and 35.

Under these circumstances, no attorney would have permitted the argument without an objection. If counsel had objected to the remarks during closing argument, the result of the trial would have been different.

Although counsel failed to object to the offending remarks, the comments were too prejudicial to have been curable with an instruction. Despite a lack of objection from trial counsel, such misconduct is so flagrant and ill-intentioned that an instruction would not have cured the prejudice. ***In***

re Glasmann, 175 Wn.2d at 707; ***State v. Evans***, 163 Wn.App. 635, 648, 260 P. 3d 934 (2011)(citing, ***State v. Warren***, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (court would not hesitate to reverse for prosecutor's misstatements of reasonable doubt standard if the trial court had not intervened to correct the mischaracterizations), cert. denied, ***Warren v. Washington***, 556 U.S. 1192,129 S.Ct. 2007, 173 L.Ed.2d 1102, (2009)).

In ***Evans***, this Court reversed for misconduct refusing to speculate that a curative instruction could have overcome the state's attack on Evans' presumption of innocence. ***Evans***, 163 Wn.App. at 648. Here too, this Court cannot speculate that in a case where the evidence boils down to a credibility contest, that a curative instruction could have overcome the prosecutor's improper comments.

2. MR. OLMSTED WAS DENIED HIS RIGHT TO A FAIR TRIAL BY THE PROSECUTOR ARGUING FACTS NOT IN EVIDENCE

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the Washington State Constitution. ***Estelle v. Williams***, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); ***In re Glasmann***, 175

Wn.2d 696, 704-06, 286 P.3d 673 (2012). "A [f]air trial certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused." ***State v. Monday***, 171 Wn.2d 667, 257 P.3d 551 (2011).

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. ***State v. Boehning***, 127 Wn.App.511 at 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor's improper actions prejudice the accused person's right to a fair trial. ***Boehning***, *supra*, at 518; ***State v. Davenport***, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, ***State v. Thorgerson***, 172 Wn.2d 438, 448, 258 P.3d 43 (2011), a prosecutor must "seek convictions based only on probative evidence and sound reason," ***State v. Casteneda–Perez***, 61 Wn.App. 354, 363, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991); ***State v. Huson***, 73 Wn.2d 660, 663, 440 P.2d 192 (1968); ***State v. Belgarde***, 110 Wn.2d 504, 755 P.2d 174 (1988).

To prevail on a claim of prosecutorial misconduct the standard of review requires a defendant must show the prosecutor's conduct was both improper and prejudicial. ***Thorgerson***, 172 Wn.2d at 442. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.*; ***State v. Ish***, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Because in this case the defense failed to object to improper argument during trial, Mr. Olmsted must also establish that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. ***Thorgerson***, 172 Wn.2d at 443; ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Here, the prosecutor committed reversible misconduct in closing argument by arguing regarding the jail call despite the calls not being entered into evidence. The prosecutor argued facts not in evidence by proclaiming that Mr. Olmsted's statements to his father without having the calls admitted refuted his claim of self-defense. RP 3B at 555.

The state Supreme Court in ***In re Glasmann***, 175 Wn.2d 969, 286 P.3d 673 (2012), "unequivocally denounced" a prosecutor submitting

evidence to the jury that has not been admitted at trial. ***Glasmann***, 175 Wn.2d at 704-705 (citing ***State v. Pete***, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004)).

> The "long-standing rule" is that "'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.' " *Id.* at 555 n. 4, 98 P.3d 803 (quoting ***State v. Rinkes***, 70 Wash.2d 854, 862, 425 P.2d 658 (1967) (emphasis omitted)); see also, e.g., ***State v. Boggs***, 33 Wash.2d 921, 207 P.2d 743 (1949), overruled on other grounds by ***State v. Parr***, 93 Wash.2d 95, 606 P.2d 263 (1980).

Glasmann, 175 Wn.2d at 705.

In ***Pete,*** the Supreme Court explained evidence that is "'*outside all the evidence* admitted at trial, either orally or by document[]'... is improper because it is not subject to objection, cross examination, explanation or rebuttal." ***Pete***, 152 Wn.2d at 552-553 (emphasis in original) (citations omitted). In ***Pete***, the prosecutor inadvertently sent to the jury Pete's written signed statement and a police report. ***Pete***, 152 Wn.2d at 553. The report and statement were inculpatory; the police report indicated that Pete was involved in the beating; and Pete's written statement indicated that he took property from the victim. ***Pete***, 152 Wn.2d at 554. The Court reversed, holding that the

introduction of these two documents was prejudicial because one indicated that Pete took property which was inculpatory and the other contradicted his defense which "seriously undermined" his general denial defense. ***Pete***, 152 Wn.2d at 554-555.

In ***Glasmann***, the prosecutor altered admitted evidence to influence the jury to find the defendant guilty. ***Glasmann,*** 175 Wn.2d at 705. Specifically, the prosecutor put captions under a bloody, disheveled photographic image of ***Glasmann*** that challenged his veracity. The Court held that "the prosecutor's modification of photographs by adding captions was the equivalent of unadmitted evidence. There certainly was no photograph in evidence that asked [for example] 'DO YOU BELIEVE HIM?'" ***Glasmann***, 175 Wn.2d at 706. The Court held the altering evidence was prejudicial in the same manner as the admission of facts not in evidence because both involved the improper use of the "prestige associated with the prosecutor's office [] [and] because of the fact-finding facilities presumably available to the office." ***Glasmann***, 175 Wn.2d at 706.

In ***Rinkes***, 70 Wn.2d at 855, 425 P.2d 658, the prosecutor inadvertently sent a newspaper editorial and cartoon highly critical of "lenient

court decisions and liberal probation policies". ***Rinkes,*** 70 Wn.2d at 862-863. Although inadvertent, the court held that the material was "very likely indeed" to be prejudicial and assumed that "the requisite balance of impartiality was upset" because the material was "clearly intended to influence the readers" and "may well have evoked" "the necessity for being stricter and less careful about observing legal principles and procedure in dealing with defendants accused of crime." ***Rinkes***, 70 Wn.2d at 862–63.

In ***State v. Pierce***. 169 Wn.App. 533, 280 P.3d 1158 (2012), the prosecutor created a fictitious dialogue of what the defendant may have been thinking before and during the murders and recited it in the first person narrative during closing. ***Pierce***, 169 Wn.App. at 453-54. The Court held that this argument was improper because it was based purely on the prosecutor's speculation and not on the evidence. ***Pierce***, 169 Wn.App. at 455. The defense objected to this argument but not to others that improperly appealed to passion and prejudice of the jury. The Court held that no curative instruction would have cured the invitation to the jury to imagine themselves in the victims' shoes. ***Pierce***, 169 Wn.App. at 556.

Here, the State used the jail calls to significantly undermine Mr.

Olmsted's self-defense claim. The introduction of fact and contents of the calls not in evidence was not inadvertent, rather it was deliberate as in ***Glasmann*** and ***Pierce***.

This argument of facts not in evidence was prejudicial because it was designed to influence the jury to believe Ms. Yeager where Mr. Olmsted's credibility regarding self-defense was directly challenged, which prejudiced Mr. Olmsted because it tilted "the requisite balance of impartiality". ***Rinkes***, 70 Wn.App. at 863. Here the inference created by the State of Mr. Olmsted acting violently, and losing control without provocation created a substantial likelihood that this misconduct affected the jury verdict.

Pete, ***Rinkes***, and ***Glasmann***, condemn the use of facts not in evidence to sway a jury into finding a state's witness more credible than the defendant. In ***Glasmann***, despite a lack of objection from trial counsel, the Court held such misconduct to be so flagrant and ill-intentioned that an instruction would not have cured the prejudice. ***Glasmann***, 175 Wn.2d at 707.

Mr. Olmsted's case was based primarily on his credibility, particularly in light of his assertion of self-defense. Once the prosecutor tipped the

balance of impartiality and swayed it toward Ms. Yeager, there was no possible way to undo this damage. Here as in ***Glasmann***, despite a lack of objection from trial counsel, the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. ***Glasmann***, 175 Wn.2d at 707. For this reason, this Court should reverse the conviction and remand for a new trial.

D. CONCLUSION

Based on the forgoing, as well as the previously submitted brief of the petitioner, this Court should reverse Mr. Olmsted's conviction.

DATED: June 28, 2017.

Respectfully submitted,
THE TILLER LAW FIRM

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